

November 12, 1971

REPORT OF DISCUSSIONS WITH FTC STAFF

On the afternoon of November 12, Messrs. Kornegay and Austern talked with Messrs. Pitofsky, Thain, Brauninger, Miller, and Power of the FTC Staff.

Mr. Kornegay opened the meeting by reporting that on Wednesday, November 10, the Tobacco Institute representatives had reported, to a full meeting of company executives, marketing men, and lawyers, the discussions had with the Staff on November 3, 1971, and supplementary discussions on November 10. He had stated the Commission position, as represented by the Staff, to be that without additional "contrast" it could not accept the industry proposal as satisfying what would be a "clear and conspicuous" disclosure of the warning statement in print advertising. He had reported the double point that the Staff wanted black on white, was investigating the possibility of tinting to achieve comparable color contrast, but was insisting upon a type size at least four points higher in each grouping and proportionalized in any print ad falling well within any one of the brackets.

Mr. Kornegay stated that after a very vigorous discussion the industry had agreed (a) to accept "black on white" as part of a full settlement; (b) but was adamant that a four percent area concept or a four point increase in type would not be acceptable. Mr. Austern added that many industry people had voiced the view that with the latter requirement it would not be feasible to have print advertising of cigarettes because each advertisement would be substantially an anticigarette advertisement.

It was further made clear that the examples of the industry proposal in "black on white" were makeshift mock-ups and that it had been made plain in Mr. Kornegay's letter of October 13 to the FTC Chairman that these had been prepared solely in response to his request and were not to be regarded as any departure or shift from the industry position presented on September 28 last.

Mr. Austern urged upon Mr. Pitofsky that the Commission was being offered a thoroughly reasonable and attractive settlement in that they were getting more than in all other advertising cases, a permanent order that was most specific, that the industry had surrendered its right

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to utilize colors or white on black, that the black on white box would stand out like a sore thumb on each advertisement and might indeed make it a close economic question whether it was worthwhile to have print advertising.

Mr. Pitofsky, for the Staff, responded that he had not appreciated that a four point increase in print size would be equivalent to four percent of the advertisement, that this might be true in the case of TV Guide size, but would not be acceptable to the Staff in a Newsweek or Life size. He stated that it was the Staff position that the warning statement in each advertisement would have to be in "black on white" occupying an area of four percent of the advertisement or an equivalent area.

In these circumstances, Messrs. Kornegay and Austern (after leaving the meeting for a private conference) saw no point in suggesting any additional concessions that they might present to the industry on the agreement of the Staff that they would not oppose them.

Instead, the discussion turned to the industry request that it be given an opportunity to present its revised proposal, i.e., the original industry proposal in black on white, to the full Commission at the Commission table in an informal conference. It would be understood that the Staff was opposed to that proposal but it was suggested that in view of the importance of these problems the industry should have the opportunity of at least a brief presentation by its negotiators to the full Commission.

Mr. Pitofsky stated that he would have no objection to this. He said that this presentation could not possibly be on the Commission agenda in view of the rule that agenda items had to be noted a week in advance. The earliest possible date would be at the Commission meeting on Tuesday, November 23. Mr. Pitofsky further pointed out that if any Commissioner opposed, it would be necessary for the Commission first to resolve at one of their meetings whether they would permit the presentation. He agreed, however, to walk the request around to each Commissioner on Monday, November 15, and undertook to advise Mr. Kornegay in midweek whether the Tuesday date would be acceptable.

Mr. Pitofsky further stated that the industry could prepare further mock-ups showing its proposal in black on white if it desired to do so.

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Mr. Pitofsky then raised a series of questions which he suggested might be asked at the Commission presentation either of industry representatives or of the Staff.

The first was that the width of the rule specified in paragraph 4 of the industry proposal did not appear to be wide enough or ascend proportionally. It was suggested that this was probably a minor point.

The second was that the industry should be prepared to indicate why a four percent area was not acceptable.

The third had to do with the problem of half-page ads in the various brackets as to which it was suggested that this could be handled on a proportionalization of the type size between the top and the bottom of the bracket.

The fourth point involved a worry on the part of the Staff that the industry might cut off a color plate an inch or so from the bottom and place the rectangle, the T&N, and the copyright notice across the bottom of the advertisement. He was assured that this was not the industry intention. In response to a question by Mr. Austern, he agreed, however, that a substantial black and white advertisement would not be regarded as failing to comply with the industry proposal.

Fifth, the question was raised by the Staff as to the treatment of point-of-sale materials, promotional materials, and billboards. Mr. Austern stated that if we could not get agreement on these principal points relating to the largest percentage of print material, there was no point in getting into these areas. Mr. Pitofsky indicated that he would want the warning statement proportionalized on promotional materials, but that he was not particularly interested in billboards as long as the warning statement was large enough to be read by a pedestrian walking by the billboard even though it might not be readable by a motorist.

The significance of these supplementary inquiries after it had been determined that the industry and the Staff were not in agreement was not pursued.

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